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## Liability for Urban Riot Damage

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## LIABILITY FOR URBAN RIOT DAMAGE

In the summer of 1967, racial tensions in Newark, New Jersey erupted into uncontrollable mass violence which overwhelmed two-thirds of the city and lasted three to four days. Twenty-nine homes and 1029 business establishments were damaged or destroyed, and property losses amounted to \$15 million.<sup>1</sup> *A & B Auto Stores, Inc. v. City of Newark*<sup>2</sup> consolidated<sup>3</sup> 450 suits instituted against the City of Newark for damages arising out of the disorders on the grounds of (1) common law negligence and (2) statutory municipal liability for riot damage.<sup>4</sup> The court resolved the question of common law liability against the plaintiffs because of the city's sovereign immunity. However, relief under the riot damage statute was held to be available in light of the judicial determination that a riot, or a series of riots, did occur within the meaning of the statute.

### I. COMMON LAW NEGLIGENCE

Acknowledging that the doctrine of sovereign immunity has waned considerably in New Jersey and other jurisdictions, the court nevertheless withheld common law relief in *A & B Auto Stores* because a city's immunity is generally retained with regard to *discretionary* municipal functions even though municipal liability is extended in other areas.<sup>5</sup> Discretionary functions consist of governmental policy

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1. 106 N.J. Super. 491, 256 A.2d 110 (Super. Ct. 1969).

2. *Id.*

3. The consolidated trial was only for the purpose of resolution of common issues, basically whether the city could be held liable.

4. N.J. STAT. ANN. § 2A:48-1 (1952): "When, by reason of a mob or riot, any property, real or personal, is destroyed or injured, the municipality if it has a paid police force, in which the mob congregates or riot occurs, or, if not in such a municipality, the county in which such property is or was situate, shall be liable to the person whose property was so destroyed or injured for the damages sustained thereby, recoverable in an action by or in behalf of such person."

5. Even where governmental immunity has purportedly been abolished, the protective niche for discretionary (or governmental—in jurisdictions retaining the traditional governmental-proprietary distinction) functions has been adopted or sustained. *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P.2d 457 (1961), heralded as the case abolishing sovereign immunity, provided an exemption for discretionary acts in California. Subsequent legislation undercut the effect of this decision by immunizing a municipality from liability arising from failure to enforce any law. Thus, in *Susman v. City of Los Angeles*, 269 Cal. App. 2d 803, 75 Cal. Rptr. 240 (Ct. App., 2d Dist. 1969), it was held that the

determinations immune from liability because they involve political issues which are not judicially reviewable.<sup>6</sup> Accordingly, in the absence of a statute, governments are held immune from liability for injuries resulting from the exercise or non-exercise of the general police power,<sup>7</sup> including the failure to provide adequate police protection from riots or ordinary crimes.<sup>8</sup>

## II. STATUTORY LIABILITY

Although Newark escaped common law liability, its sovereign immunity did not bar the application of the New Jersey riot damage statute.<sup>9</sup> That enactment imposes strict liability whenever a mob or riot results in property damage in a municipality maintaining a paid police force. Since Newark did maintain a paid police force, its liability was contingent upon the civil disorder of July, 1967 being considered a "mob" or a "riot" within the meaning of the statute. Neither term is defined in the statute, but a related statute providing

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municipality was not liable for failure to provide police protection during the Watts riot of 1965. Unfortunately for the plaintiff, the California legislature had responded to the *Muskopf* decision by repealing its riot damage statute on the ground that it was no longer necessary. *See also*, *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); *Koepp v. City of Hudson*, 276 App. Div. 443, 95 N.Y.S.2d 700 (1950); *Simon v. City of New York*, 53 Misc. 2d 622, 279 N.Y.S.2d 223 (N.Y. City Civ. Ct. 1967); *Barnum v. State*, 435 P.2d 678 (Wash. 1967); *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1968).

6. The discretionary limitation is supported as being necessary to retain an orderly governmental process, including adherence to constitutionally and statutorily ordained distributions of political power. Were every decision of a discretionary nature which has been entrusted to the municipality subject to review by lay juries, the operation of government would be severely hindered. *Dalehite v. United States*, 346 U.S. 15, 59 (1953) (dissenting opinion).

"Public officials must be free to determine these questions without fear of liability either for themselves or for the public entity they represent. It cannot be a tort for government to govern." *Amelchenko v. Borough of Freehold*, 42 N.J. 541, 550, 201 A.2d 726, 730 (1964).

7. *See, e.g.*, *Jackson v. Hankinson*, 51 N.J. 230, 238 A.2d 685 (1968); *Bergen v. Koppenal*, 97 N.J. Super. 263, 235 A.2d 30 (Super. Ct. 1967), *aff'd as modified*, 52 N.J. 478, 246 A.2d 442 (1968).

8. *See, e.g.*, *Westminster Investing Corp. v. Murphy Co.*, 296 F. Supp. 1300 (D.D.C. 1969); *Susman v. City of Los Angeles*, 269 Cal. App. 2d 803, 75 Cal. Rptr. 240 (Ct. App., 2d Dist. 1969); *Huey v. Town of Cicero*, 41 Ill. 2d 361, 243 N.E.2d 214 (1968); *Roy v. Town of Hampton*, 226 A.2d 870 (N.H. 1967).

9. *Supra* note 4. Statutes providing either damages for riot losses or damages for mob and/or riot losses shall be referred to within this comment as "riot damage statutes." Statutes providing damages for mob losses only shall be referred to as "mob damage statutes."

relief for both property damage and personal injury caused by mob action defines "mob" as:

[A] collection of individuals—five or more in number—assembled for the unlawful purpose of offering violence to the person or property of any one supposed to have been guilty of the violation of a law, or for the purpose of exercising correctional powers or regulative powers over any person, by violence and without lawful authority . . . .<sup>10</sup>

Plaintiffs did not argue that the disturbance constituted mob action because it was obvious that the facts did not conform to the definition in the mob damage statute. Essentially then, the principal interpretive problem lay in determining whether the disturbance was a riot.

Unlike "mob," "riot" is not defined in any New Jersey statute. Historically, "mob" and "riot" have been used interchangeably within the context of riot damage statutes, and some confusion of the terms has resulted.<sup>11</sup> But the court in *A & B Auto Stores* rejected the city's contention that "riot" is synonymous with "mob"<sup>12</sup> and turned to the common law meaning of the term to formulate a definition for purposes of applying the riot damage statute. The court held that "[a] riot is simply a tumultuous disturbance of the peace by a group of three or more persons having a common purpose who act in concert to accomplish their purpose through force or violence."<sup>13</sup> It also stated that the concept of "riot" could not be limited by such factors as the number of disorders, the intensity of the disorders, the quantity or geographic breadth of the resultant harm, the number of riotous groups involved, the underlying cause of the disorders, or

10. N.J. STAT. ANN. § 2A:48-8 (1952). "Mob" is similarly defined in a section providing criminal sanctions for participation in mob action. N.J. STAT. ANN. § 2A:126-1 (1952). Had personal injuries alone been involved or had plaintiffs elected to sue under N.J. STAT. ANN. § 2A:48-8 instead of N.J. STAT. ANN. § 2A:48-1, only the occurrence of a mob would have resulted in liability and recovery in the instant case would have been foreclosed. OHIO REV. CODE ANN. § 3761.01 (1953), defines mob as "[A] collection of people assembled for an unlawful purpose and intending to do damage or injury to anyone, or pretending to exercise correctional power over other persons by violence and without authority of law." The statute also requires an intention to lynch.

11. See, e.g., *Lee v. City of Kansas City*, 175 Kan. 729, 267 P.2d 931 (1954), and *Koska v. City of Kansas City*, 123 Kan. 362, 255 P. 57 (1927). Although the mob damage statutes arose to handle lynch mob situations only, they are often sufficiently parallel to the riot damage statutes to create a false sense of interchangeability of the terms.

12. 106 N.J. Super. at 504, 256 A.2d at 117.

13. *Id.* at 502, 256 A.2d at 116.

the size of the target of violence.<sup>14</sup> Examining the facts, the court concluded that the evidence was overwhelming and undisputed that a riot did occur within the meaning of the statute and thus held the city liable.<sup>15</sup>

In addition to the instant case, New Jersey courts have decided four other cases under the riot damage and mob damage statutes.<sup>16</sup> No prior case defined "riot," nor did any case limit the applicability of the statute by the nature of the disorder.

With few exceptions, riot or mob damage statutes in other jurisdictions<sup>17</sup> have been interpreted as infrequently as the New Jersey statutes. In the absence of an express statutory definition of "riot," the courts have traditionally relied upon common law and criminal law definitions.<sup>18</sup> A number of cases have refined the borrowed concept of "riot" by specifying various factors not to be regarded as limiters in determining the occurrence of a riot. Two early cases agree with the New Jersey court that the size and strength of the disturbance are immaterial to the applicability of a riot damage statute.<sup>19</sup> Courts have similarly held it to be irrelevant whether the

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14. *Id.* at 507, 256 A.2d at 119.

15. The court did not determine damages. That issue was to be resolved at individual hearings at which the city could raise the statutory defenses of lack of notice and/or contributory negligence.

16. *Clark Thread Co. v. Board of Chosen Freeholders of Hudson County*, 54 N.J.L. 265, 23 A. 820 (1892); *Carey v. City of Paterson*, 47 N.J.L. 365, 1 A. 473 (1885); *Hailey v. City of Newark*, 22 N.J. Misc. 139, 36 A.2d 210 (C.P. Essex County 1944); *Wells Fargo & Co. v. Mayor & Aldermen of Jersey City*, 207 F. 871 (D.N.J. 1913), *aff'd.*, 219 F. 699 (3d Cir. 1915), *cert. denied*, 239 U.S. 650 (1916).

17. CONN. GEN. STAT. REV. § 7-108 (1958); KAN. GEN. STAT. ANN. § 12-201 (1949); KY. REV. STAT. § 411.100 (1963); ME. REV. STAT. ANN. tit. 17, § 3354 (1954); MD. ANN. CODE art. 82, §§ 1-3 (1957); MASS. GEN. LAWS ANN. ch. 269, § 8 (1965); MO. REV. STAT. §§ 537.140-160 (1959); MONT. REV. CODES ANN. § 11-1503 (1947); N.H. REV. STAT. ANN. § 31:53 (1955); OHIO REV. CODE ANN. § 3761.01 (1953); PA. STAT. ANN. tit. 16, § 11821 (1956); R.I. GEN. LAWS ANN. § 45-15-13 (1966); S.C. CODE ANN. § 16-107 (1962); W. VA. CODE ANN. § 61-6-12 (Supp. 1966); WIS. STAT. § 66.091 (1961). Except for Kansas, Ohio and Wisconsin, no state has had more than one or two cases; Maine and Missouri have had none.

18. Note, *Compensation for Victims of Urban Riots*, 68 COLUM. L. REV. 57, 69 (1968). Compare the definition of "riot" used in *Adamson v. City of New York*, 188 N.Y. 225, 80 N.E. 937 (1907), construing the defunct New York riot damage statute, which was later suspended by the New York Defense Emergency Act, N.Y. UNCONSOL. LAWS § 9193-3 (McKinney 1961), with a typical common law definition. See note 12 *supra*.

19. *Allegheny County v. Gibson*, 90 Pa. 397 (1897); *City of Chicago v. Pennsylvania Co.*, 119 F. 497 (7th Cir. 1902).

unlawful common purpose was formed before or after the rioters assembled.<sup>20</sup> A feeling of terror in the general populace has often been required.<sup>21</sup> There is some question whether the parties must entertain an intent to assist one another with force against opposition to their common purpose.<sup>22</sup> No other jurisdiction has attempted as comprehensive a definition of "riot" as that of the New Jersey court in the instant case.<sup>23</sup> Thus, while *A & B Auto Stores* is not the first case to interpret the meaning of "riot" under a riot damage statute, it is clearly one of the first to contribute substance to this ambiguous term.

The court assured maximum applicability of the statute by adopting the classic common law definition<sup>24</sup> and enumerating several factors to be excluded from consideration in determining whether a riot occurred. This interpretation permanently divorces the concept of "riot" from any connotation of "mob" or "insurrection."<sup>25</sup> A mob entails the purpose of offering violence to exert correctional or regulative power over a law violator, and an insurrection offers purposive, organized resistance to established government. Both terms require a preconcerted plan or purpose. But for a riot, the court held that a general purpose to destroy and injure was sufficient. While both a mob and an insurrection are purposive and goal-oriented, a riot is purposeless and random. Since recent disturbances have been predominantly spontaneous and non-purposive in nature, the court's characterization is a significant accommodation of the riot damage

20. *City of Madisonville v. Bishop*, 113 Ky. 106, 67 S.W. 269 (1902); *Yalenezian v. City of Boston*, 238 Mass. 538, 131 N.E. 220 (1921).

21. *See, e.g.*, *Yalenezian v. City of Boston*, 238 Mass. 538, 131 N.E. 220 (1921); *Febock v. Jefferson County*, 219 Wis. 154, 262 N.W. 583 (1935).

22. *Compare Yalenezian v. City of Boston*, 238 Mass. 538, 131 N.E. 220 (1921), with *Duryea v. City of New York*, 10 Daly 300, *aff'd without opinion*, 100 N.Y. 625 (1882).

23. Only Ohio, limited by a statute specifically requiring the occurrence of a lynching, has effected any kind of dramatic liberalization of its statute: A recent case held that a cause of action under the statute was stated—that a lynching occurred—where cab drivers were assaulted by a mob violently seeking social reform. *Parker v. Board of County Commissioners*, 15 Ohio Op. 2d 77, 239 N.E.2d 124 (1969). Earlier cases were extremely technical about the lynching requirement. *See, e.g.*, *Davis v. Board of Commissioners*, 8 Ohio App. 30 (1917), and *Gray v. Gibson*, 12 Ohio N.P. (n.s.) 673 (1912).

24. 106 N.J. Super. at 502, 256 A.2d at 116.

25. The court rejected the city's claim that the disorder constituted an insurrection rather than a riot, inasmuch as there was no armed, organized attack upon the government. Liability would have been precluded had either an insurrection or a rebellion occurred. *Id.* at 506, 256 A.2d at 118.

statute to the modern phenomenon of riot. Instead of the particularity of "mob" or "insurrection," the new concept of "riot" embraces a broad range of disorders, the definition being of sufficient flexibility to assure the viability and adequacy of the statute as changes in the form of expression of violence correspond to changes in society. The principal danger of the court's interpretation lies in the fact that the door is now open for application of the riot damage statute far beyond legislative intent—to municipal liability for losses resulting from ordinary crime.<sup>26</sup>

### CONCLUSION

Although the broadened applicability of the statute may be of significance to these plaintiffs and to future victims of urban riots in New Jersey, it is unlikely that municipal liability for riot damage outside that state will be affected by this decision. Only sixteen states have any form of riot or mob damage statute.<sup>27</sup> Those states in which the most explosive riots have occurred and are likely to recur are among those currently without such statutes.<sup>28</sup> Municipal resources are generally inadequate to cope with the problem of reparations; in light of the financial difficulties cities have in merely conducting normal programs and services, the added costs of restoring order and repairing property are prohibitive. One commentator postulates the existence of a "riot cycle," wherein the deferment of social welfare expenditures in order to pay the costs of riot containment and repair leads to frustration and further rioting.<sup>29</sup>

Rather than lending assistance to the overburdened cities, the states have responded by limiting statutory municipal liability.<sup>30</sup> Meanwhile, the federal government has begun to assume a greater role in the solution of urban problems in general. However, federal legis-

26. Cases rejecting municipal liability for damages resulting from crime include: *Hanners v. City of Kansas City*, 154 Kan. 324, 118 P.2d 532 (1941), and *International Wire Works v. Hanover Fire Ins. Co.*, 230 Wis. 72, 283 N.W. 292 (1939).

27. *Supra* note 17.

28. Alabama, California, Illinois, Louisiana, Michigan, New York and Tennessee do not have riot damage statutes.

29. Note, *Recovery from Urban Riots—Toward a Comprehensive Plan*, 33 ALBANY L. REV. 582, 586 (1969).

30. In response to the Newark riots, the New Jersey legislature in 1968 amended the riot damage statute to impose a limit of \$10,000 on compensable damages per claimant and to preclude reparations for those victims whose losses are covered by insurance. N.J. REV. STAT. § 2A:48-1 (1969).

lative proposals directed at the restoration problems following riots have generally been unsuccessful. Most proposals have been lost in congressional committees.<sup>31</sup> The only such proposal enacted is the Federal Reinsurance Act,<sup>32</sup> part of the Housing and Urban Development Act of 1968, which provides federal reinsurance for private insurance companies in order to encourage them to underwrite risks in potential riot areas. The inattentiveness of our lawmakers and the refusal of our judiciary to revoke municipal immunity are not in any way indicative of a lack of urgency. Rather, deserted, gutted buildings worsen the physical blight of the slums, abandoned businesses<sup>33</sup> intensify the social and economic decay, and the next urban riots are being hastened.

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31. *See, e.g.*, S. 2209, 90th Cong., 1st Sess. (1967); S. 2223, 90th Cong., 1st Sess. (1967); S. 2258, 90th Cong., 1st Sess. (1967); H.R. 11891, 90th Cong., 1st Sess. (1967); H.R. 11896, 90th Cong., 1st Sess. (1967).

32. 12 U.S.C.A. § 1749bbb-9 (1968).

33. Ten per cent of the business establishments destroyed or damaged in Newark are not reopening. 68 COLUM. L. REV. 57, 58 (1968).